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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RYAN CABUTO, Defendant.	)	Criminal Case No. 08CR0070-LAB Date: June 16, 2008 Time: 9:30 a.m. GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION FOR DOWNWARD DEPARTURES TOGETHER WITH MEMORANDUM OF POINTS AND AUTHORITIES

The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and ALESSANDRA P. SERANO, Assistant United States Attorney, hereby files its response and opposition to Defendant's motion for downward departures.

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POINTS AND AUTHORITIES

The Government opposes Defendant's motion for downward departures based upon (1) mental capacity, and (2) a combination of factors. See Defendant's Motion for Downward Departures [ECF #30] at 10-14. Downward departures in child exploitation cases are very limited pursuant to the PROTECT Act passed in April 2003. 18 U.S.C. §3553(b)(2)(A); U.S.S.G. §5K2.0(b)(2006).[1] Pursuant to 18 U.S.C. §3553(b)(2)(A)(ii), in child crimes and sexual offenses, a district may only depart downward if "the court finds that there exists a mitigating circumstance of a kind or to a degree that - (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 18.... (II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and (III) should result in a sentence different from that described..."

Defendant acknowledges that the adjusted offense level pursuant to the plea agreement in this case is 24. However, Defendant requests this Court to depart downward fourteen levels to place Defendant is Zone B. Zone B for CHC I is level 10 with an advisory guideline range of 6-12 months. Presumably, Defendant will request a sentence that falls within the 6-12 month range. The Government objects to such a sentence for this type of serious offense as wholly unreasonable.

It should be noted that Defendant already received a huge benefit by having the Government not to recommend the +4 level increase under USSG §2G2.2(b)(4) for sadistic or masochistic content and for the two level increase for distribution under USSG §2G2.2(b)(3)(F). Both increases are not being recommended pursuant to plea negotiations. If such increases would have been recommended (as Probation has asserted), his advisory guideline range would be 97-121 months.

Simply put, Defendant has not met the threshold under 18 U.S.C. §3553(b)(2)(A)(ii) to warrant a fourteen level downward departure. First, as to his departure based upon mental capacity caused by the alleged molestation by a female babysitter, while if true, these events are tragic. However, this does not excuse Defendant's behavior and continued victimization of other children who were abused.

[1] The 2006 U.S. Sentencing Guidelines were referenced given the fact that the offense date was January 2007.

Defendant spent nearly half of his life viewing, possession, downloading and distributing child pornography. One need only review the electronic communication between Defendant and the undercover officer (attached as Exhibit 1 to the Government's sentencing memorandum) to see Defendant's reaction and comments towards the sexually explicit images of the approximately 6 year old girl he distributed to the undercover officer. The comments are disturbing. Defendant was not just collecting and viewing child pornography to satiate his "psychological impairment." Instead, he took affirmative steps to distribute and trade with others in order to collect more images, thus furthering the dissemination of the recorded images of child abuse.

Second, Defendant has failed to show any circumstance much less a combination of circumstances to warrant a fourteen level downward departure under USSG §5K2.0. With regard to his "psychological impairment", while it may be true that he has issues to deal with, his behavior should not be excused. Defendant obviously knew what he was doing was wrong, as evidenced by his ability to stop viewing child pornography for over two years and by him"smashing" his computer. He was a psychology student so he was in the best position to seek help for himself. He failed to do so and now cannot seek a departure for his "psychological impairment".

With regard to his vulnerability with other prisoners, the Government will recommend that Defendant be placed in a sex offender treatment program while in the custody of the BOP so that he can get the help he needs and not be subjected to abuse for the nature of his offense. Such facilities include FMC Devens, FCI Mariana, FCC Petersburg, FCI Seagoville and FCC Tucson. Defendant can continue the treatment he needs while in custody as well as be confined in a facility with others who have been convicted of similar offenses.

With regard to future risk or danger to the community, Defendant submitted several doctors reports stating he is unlikely to re-offend. However, no one can predict the future. No one can state for certain whether a person will re-offend. A custodial sentence will adequately address punishment, deterrence to others, provide the treatment Defendant needs as well as address all of the §3553(a) factors. Moreover, a longer term of supervised release is recommended to ensure that Defendant complies with each and every condition of his release.

Lastly, Defendant's comparison to what type of sentence he might receive on the state side is completely irrelevant. One cannot compare the two criminal justice systems on the same level. Defendant was investigated and apprehended by a federal law enforcement agency (ICE) and was duly prosecuted by the U.S. Attorney's Office for a federal offense. He pled guilty to a federal felony offense. As such, he is subject to the penalties of the federal criminal justice system. The consumers of child pornography, like Defendant, must be punished with a custodial sentence.[2] By passing the PROTECT Act in 2003 and more recently, the Adam Walsh Act in 2006, Congress' intent that offenses involving child pornography are to be treated severely. United States v. Goff, 501 F.3d 250, 258, n.13 (3rd Cir. 2007).

IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court sentence the Defendant to 51 months in custody, the low end of the advisory guidelines, followed by 10 years of supervised release, no fine, and impose the $100 penalty assessment.

DATED: June 9, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ Alessandra P. Serano

ALESSANDRA P. SERANO
Assistant U.S. Attorney

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[2] The Eleventh Circuit recently noted that other than one unpublished case from the Fifth Circuit, all other appellate courts have consistently overturned zero-imprisonment or other "sharply downward-varying sentenced" for child pornography offenses. United States v. Pugh, 515 F.3d 1179, 1203 (11th Cir. 2008).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RYAN CABUTO, Defendant.	Case No. 08CR0070-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, ALESSANDRA P. SERANO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motion for Downward Departure, on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Robert Boyce, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 9, 2008.

s/Alessandra P. Serano
ALESSANDRA P. SERANO